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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR GUADALUPE GARCIA,

Defendant and Appellant.

B211029

(Los Angeles County  
Super. Ct. No. KA082262)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Charles E. Horan, Judge. Affirmed as modified.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

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Cesar Guadalupe Garcia appeals from the judgment following a jury trial that resulted in his conviction of attempted premeditated murder (Pen. Code, §§ 664/187, subd. (a); count 1)<sup>1</sup> during which he discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), & (d)); discharge of firearm with gross negligence (§ 246.3, subd. (a); count 3); and assault with a firearm (§ 245, subd. (a)(2); count 4) while personally using a firearm (§ 12022.5) and court findings that he had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) which also qualified as a strike under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)).<sup>2</sup> He was sentenced to prison on count 1 to life with the possibility of parole, doubled for the strike, plus 25 years to life for the firearm discharge enhancement; on count 4 to the 3-year middle term, doubled to 6 years for the strike, plus 10 years for the firearm use enhancement; and to 5 years for the serious felony enhancement. On count 3, the trial court imposed, but stayed, a 2-year middle term.

Garcia contends his conviction for the attempted premeditated murder of Ricardo Mejia (count 1) must be reversed because of two separate due process violations: (1) the pretrial photographic lineup of the shooter's car was unduly suggestive; and (2) Mejia's in-court identification of Garcia was tainted both by the earlier improper car lineup and by Mejia's identification of Garcia from a pretrial photographic lineup.<sup>3</sup> He also contends that to the extent these claims are forfeited for lack of an objection, he was denied effective assistance of counsel.

By letter, this court invited the parties to address whether the trial court erred by imposing double life terms on count 1 for attempted premeditated murder and (2) failing

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<sup>1</sup> All further section references are to the Penal Code.

<sup>2</sup> The jury found Garcia not guilty of the attempted premeditated murder of Yesenia Garcia charged in count 2.

<sup>3</sup> He does not challenge his firearm-related convictions in counts 3 and 4, in which the victim was Yesenia.

to double the 2-year middle term on count 3 to 4 years. We have received their responses.

Based on our review of the record and applicable law, we modify the judgment to reflect Garcia's sentence on count 1 is life with a minimum term of 7 years, doubled to 14 years for the strike, plus 25 years to life for the firearm discharge enhancement; his sentence on count 3 is the 2-year middle term, doubled to 4 years for the strike. His sentence on count 3, as modified, remains stayed (§ 654), as ordered by the trial court. As so modified, we affirm the judgment.

### **BACKGROUND**

The defendant Garcia, his wife Yesenia, and the victim Mejia all worked at the Bloomfield Bakery. Garcia worked the shift from 6:00 a.m. to 2:00 or 3:00 p.m. Yesenia worked the 3:00 p.m. to 3:00 a.m. shift, and Mejia worked the 3:00 p.m. to midnight shift. In approximately 2005, Mejia met Yesenia at work, and they began dating about six months later. They engaged in sexual relations for about a month but Mejia ended the relationship when he discovered that Yesenia was married. Although Mejia remembered seeing Garcia at work on two occasions, he did not know that Garcia was Yesenia's husband. The first occasion that he noticed Garcia was when Garcia stood next to his desk looking at him curiously. The second occasion was in the bakery parking lot. Mejia was in his car with his live-in girlfriend, who also worked there, when Garcia, who was walking from one building to another, passed in front of Mejia's Toyota pickup truck and looked inside, "[a]lways staring at us," as he walked past.

Approximately a week and a half before the shooting, after leaving work at midnight, as Mejia was driving his usual route home, he noticed a white Honda Civic with its lights off at Irwindale and Foothill. As the two vehicles entered the 210 freeway, the Honda's lights, one bright "bluish" color, and the other "yellowish" color came on. He slowed to allow the Honda to pass but it never did. He then increased his speed because the Honda was tailgating him. Although Mejia moved over to allow the other car to pass, the Honda "just got next to" Mejia. About 15 to 20 miles later, Mejia took

the Mountain Avenue exit and made a right turn. The Honda was still with him. To determine whether the Honda was in fact following him, Mejia sped up and made a fast U-turn at an island on Mountain. Mejia was able to see the faces of both occupants. At the time, he did not recognize either but noticed that they were both males. At a court hearing in April, 2008, however, Mejia recognized one as Garcia.

On February 27, 2008, at midnight, Mejia left work in his truck. A car with dim headlights pulled behind him when he stopped for the traffic light at Irwindale and Foothill and followed him onto the eastbound 210 Freeway. The car was a medium-size, “brown, goldish color,” American-made sedan with oval, almond shape headlights. Mejia was driving slowly in the right lane, because of the presence of cones and roadwork. As Mejia activated his left turn signal preparing to move to the next lane, the other vehicle pulled alongside his left side, preventing Mejia from merging into the lane. Mejia noticed the driver, the car’s sole occupant, was male but “it was so dark right [at] that spot of the freeway [that Mejia] didn’t get to see the person . . . who was shooting at [him],” five or six times. The shots shattered the truck’s front driver and front passenger windows. A bullet struck Mejia’s arm, and two grazed his chest. Knocking down some cones, Mejia sped away.

At 3:00 a.m. the same day, Yesenia left work and used her key<sup>4</sup> to unlock her gold color Oldsmobile Cutlass, which was still where she had parked it earlier with nothing apparently having been disturbed. While driving home, she heard strange sounds from the back of the car. Garcia crawled from the trunk area into the pulled down rear seat. Garcia, who looked “strange,” said he wanted to talk about their relationship. At some point she stopped the car and moved into the front passenger seat and Garcia, who held a gun, got into the driver’s seat. Garcia asked to be forgiven for having gone out with

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<sup>4</sup> Garcia had the only other keys to Yesenia’s Oldsmobile Cutlass. Although the car, which had been stolen previously, could be started without a key, a key was needed to open the car door.

someone else. Yesenia responded that she did not want to be with him anymore, because he had been unfaithful to her and had hit her.

During a later police interview, Yesenia stated that after Garcia emerged from the trunk where he was hiding, he accused her of not loving him and of seeing someone else instead of going to work. At some point, Yesenia, who was then in the passenger seat, tried to exit the car but Garcia pulled her back by her hair. He also grabbed her around her neck which prevented her from breathing for about a minute. He pointed the gun at her head and said, "For love people do a lot of things." When he lowered the gun, Yesenia tried to take it away from him but the gun went off near Garcia's leg, striking him. He told her, "You don't love me, uh, you don't like me. Lo—Look what you've done to me." "He said, 'I love you a f—k of a lot. I think I'm capable of doing anything.'" While driving to their house, which was behind Yesenia's sister's house, Garcia again pointed the gun at her and said, "“what did you think I was playing with you?”" He then pointed the gun at the windshield and fired two shots. Upon their arrival, Garcia told Yesenia, "I still have one left," and pointed the gun at her temple. After hearing a "click," Yesenia ran out of the car into her sister's house seeking protection.

Returning to her Oldsmobile some time after 5:30 a.m. to look for her cell phone, Yesenia found a .22 caliber casing on the car's floor which she gave to police. At the hospital, a doctor removed a .22 caliber bullet from Mejia's arm. Police recovered a .22 caliber bullet and a .22 caliber bullet fragment from the driver's door of Mejia's truck. An expert testified that the bullets, the bullet fragment, and casing could have come from the same gun.

On February 29, 2008, the police detained Garcia at the Bloomfield Bakery. He first identified himself as "Roberto Fraijo" but eventually admitted that his name was Cesar Garcia. He admitted hiding in Yesenia's car trunk to spy on her but denied having a gun.

During the investigation, police showed Mejia four photographs of different cars. Mejia was first shown photographs of a gold Honda, a gold Nissan, and a gold American

car. Mejia focused on the shape of the car's headlights before selecting the American car. He wrote on the photograph, "This is the type of car that shot at me . . . ." Police then showed Mejia a photograph of a fourth gold color car. He was shocked that it was Yesenia's car. Mejia wrote under the image, "This is the car that shot . . . at me." He explained he got a "really good" look at the car during the shooting incident and recognized the car in this photograph as Yesenia's, the one she drove when they were dating and drove everyday to work. Shown a photographic lineup of six males, he selected photographs two and five as depicting the complexion, i.e., the shape of the face and skin color, of the male who followed him in the incident prior to the shooting. Photograph two was a picture of Garcia.

## DISCUSSION

### *1. Photographic Display of Shooter's Car Not Due Process Violation*

Garcia contends his right to due process was violated because the photographic lineup of the shooter's car was unduly suggestive. No due process violation occurred.

Initially, we point out Garcia has forfeited this claim of error by failing to object on this ground at trial. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

On the merits, defendant has not cited any California or federal authority that holds identification procedures related to objects are governed by the same due process considerations which apply to the identification of individuals. On the contrary, "[t]he due process proscription against impermissibly suggestive identification procedures relates to the identification of people—not physical evidence." "[T]he trustworthiness of that identification testimony is to be tested, like other evidence discovered during a criminal investigation, by cross-examination, impeachment and argument."<sup>5</sup> (*People v. Edwards* (1981) 126 Cal.App.3d 447, 456–457.)

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<sup>5</sup> Garcia's counsel cross-examined Mejia at some length regarding the procedure leading to his identification of Yesenia's car as that of the shooter's and argued in closing that the police led Mejia to identify Yesenia's car by means of such procedure.

Garcia acknowledges that in *People v. Carpenter* (1997) 15 Cal.4th 312, our Supreme Court, citing *Edwards* with approval, concluded the suggestiveness in the identification process goes to the weight rather than the admissibility of evidence. (*Id.* at p. 369.) He urges, however, that in the absence of discussion or analysis by the *Carpenter* court in support of this conclusion, “it remains unclear whether the same rule would apply regardless of the circumstances of the individual case” and notes that in *State v. Delgado* (N.J. 2006) 188 N.J. 48 [902 A.2d 888], the court recognized that in ““extreme case[s]” the degree of suggestiveness of an identification procedure concerning an inanimate object might be so great as to contravene a defendant’s due process rights.” (*Id.* at p. 899, fn. 13; quoting *Com. v. Spann* (Mass. 1981) 383 Mass. 142 [418 N.E.2d 328, 332].)

Garcia argues this is such an extreme case, because Mejia knew the shooter’s car was American made and selected the only American-made car from the three-car photographic lineup and because he was shown a photograph of Yesenia’s car by itself, which led him to identify her car as the shooter’s car. We disagree.

Mejia was focusing on the front headlight areas of each of the three car photographs, not on the maker of each car. Also, he did not select the American-made car photo as depicting the shooter’s car. He simply referred to the car in the photograph as “the type of car that shot me . . . .” When shown the fourth photograph, Mejia stated, “My gosh, this is her car.” When asked if he were identifying the car as that of someone he knew or as the vehicle from which he was shot, Mejia responded that he recognized the car as Yesenia’s and also as the one from which he was shot. On the photograph, he wrote, “This is the car that shot me.”

## 2. *In-Court Identification of Garcia Not Tainted*

Garcia contends Mejia’s in-court identification was tainted by the impermissibly suggestive photographic identification of Yesenia’s car and also by Mejia’s belief he had to select someone as the shooter from the six-person photographic lineup. We are not persuaded.

First, Garcia forfeited these claims of error by failing to object before the trial court on the grounds urged for the first time on appeal. (See, e.g., *People v. Cunningham*, *supra*, 25 Cal.4th 926, 989.)

Second, on the merits, as we have discussed, the photographic identification of Yesenia's car as that of the shooter was not unduly suggestive. Moreover, the record refutes Garcia's contention that Mejia was compelled by police to identify the shooter from the photographic lineup. Mejia selected the photographs of the individuals in two and five as resembling someone who had followed him in the earlier incident. Detective Bailey, who conducted the photographic lineup, testified at trial that Mejia "did not identify anybody in the photographs as being the actual suspect" and Bailey "was not convinced at the time that [Mejia] was identifying anybody . . . as a suspect."

### 3. *No Ineffective Assistance of Counsel Shown*

Garcia contends to the extent his two claims of due process violations were forfeited by the absence of objections on these grounds below, his defense counsel was ineffective (U.S. Const., 6th Amend.) He fails to carry his burden.

"[A] defendant claiming ineffective representation 'must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.]' [Citation.] Because after a conviction it is all too easy to criticize defense counsel and claim ineffective assistance, a court must eliminate the distorting effects of hindsight by indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citations.]' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.)

Because Garcia would not have prevailed on the merits of his due process claims, the failure of counsel to raise those claims did not fall below the reasonable attorney



standard. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463 [“Representation does not become deficient for failing to make meritless objections”; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091[“defense counsel is not required to make futile motions or to indulge in idle acts to appear competent”].)

#### 4. *Cumulative Effect of Assigned Errors Nil*

Garcia contends even if the individual errors do not mandate reversal of his attempted premeditated murder conviction, the cumulative effect of these errors compel reversal. Because the premise that there were errors fails, so must necessarily his claim of cumulative error fail.

#### 5. *Modification of Sentences on Counts 1 and 3 Mandated*

On count 1, the trial court sentenced Garcia to life with the possibility of parole, doubled for his strike, plus 25 years to life for the firearm discharge/GBI enhancement. As the parties properly concede, this is sentencing error. In *People v. Jefferson* (1999) 21 Cal.4th 86, our Supreme Court explained that “two life sentences instead of one” for attempted premeditated murder does not “comply with the sentence-doubling requirement of section 667[, subd. ](e)(1)” in the Three Strikes law and that what must be doubled for a second strike offender is the minimum term of the indeterminate sentence, which in this case is seven years under section 3046. (*Id.* at p. 99.) We therefore will modify Garcia’s sentence on count 1 to reflect a sentence of life with a minimum term of 7 years, doubled to 14, plus 25 years to life for the firearm discharge enhancement.

The trial court also erred by failing to double the 2-year middle term on count 3 to 4 years based on Garcia’s strike (§ 667, subd. (e)(1)). We therefore will modify Garcia’s sentence on count 3 to reflect a sentence of 2 years, doubled to 4 years for his strike. The sentence on count 3, as so modified, remains stayed, as the trial court ordered.

### **DISPOSITION**

Garcia’s sentence is modified to reflect that on count 1, he is sentenced to life with a minimum term of 7 years, doubled to 14 years for his strike, plus the 25 years to life for the firearm discharge enhancement; on count 3, he is sentenced to the 2-year middle term,

doubled to 4 years for his strike. The sentence on count 3, as modified, remains stayed, as ordered by the trial court. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect the judgment as modified and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.